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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCOS ANTONIO RUIZ,

Defendant and Defendant.

A154152

(Contra Costa County
Super. Ct. Nos. 04-189906-1 & 04-
188246-3)

After revoking and reinstating defendant's probation in two cases numerous times, the trial court finally terminated probation and sentenced defendant Marcos Antonio Ruiz to a total of three years and eight months in state prison. On appeal defendant raises a single issue—that the court abused its discretion by denying his request to continue the sentencing hearing to obtain a full probation report. Defendant claims the court was required by statute and rule to order a probation report prior to sentencing. We need not, and do not, decide whether the trial court was required to order a full report, as we conclude any error in failing to do so was not prejudicial.

BACKGROUND

In November 2016, in case No. 04-188246-3, defendant pled no contest to driving under the influence, within 10 years of three other DUIs. The trial court dismissed additional counts of driving with a blood alcohol content over .08 percent and driving without a valid license. The court suspended imposition of sentence and placed defendant on probation for three years, subject to numerous terms and conditions, including that his driver's license be revoked for three years and he serve 180 days in jail.

Six months later, in May 2017, in case No. 04-189906-1, defendant pled no contest to unlawful possession of a firearm. The trial court dismissed additional counts of having a concealed weapon in a car, misdemeanor child abuse and giving false information to a police officer. The court suspended imposition of sentence and placed defendant on probation for three years. Defendant also admitted violating his probation in case No. 04-188246-3, and the court reinstated probation in that case, subject to modified terms and conditions.

One month later, in June 2017, defendant admitted violating his probation in both cases. The court revoked and reinstated probation, subject to modified terms and conditions, including that he serve 30 days in jail.

In August, defendant again admitted violating his probation in both cases. The court revoked and reinstated probation on modified terms and conditions, including that he serve 120 days in jail.

In January 2018, defendant once again admitted violating his probation in both cases. The court again revoked and reinstated probation on modified terms and conditions, including that he serve 150 days in jail.

Later the same month, defendant again admitted violating his probation in both cases. The court again revoked and reinstated probation on modified terms and conditions, including that he serve 120 days in jail.

In the meantime, a new case was filed against defendant for assault, along with petitions to revoke his probation in the two prior cases. Following a mistrial in the new case, the trial court, in March 2018, found defendant in violation of his probation in both cases, revoked probation, and set a date for sentencing.

Defendant moved to continue the sentencing hearing on the ground he was entitled to a full probation report and the probation summary report that had been submitted to the court was insufficient under sections 1203.7 and 1203.10, and California Rules of Court, rules 4.411 and 4.411.5 and due process principles. In support of his motion, defendant submitted his own sentencing memorandum recounting his social and personal history.

At the outset of the sentencing hearing, the prosecutor opposed the motion to continue and the trial court denied the motion, stating it did not agree that defendant was entitled to a full probation report.

The court then proceeded to sentencing, and over the course of more than an hour and a half, asked defense counsel and the prosecutor their views on the factors set forth in California Rules of Court, rule 4.414 (“Criteria affecting probation”), in rules 4.421 and 4.423 (Circumstances “in aggravation” and “in mitigation”), and in rule 4.425 (“Factors affecting concurrent or consecutive sentences”). It then provided its indicated sentence—a consecutive sentence of three years (for the possession offense) and eight months (for the DUI offense)—and heard further argument by counsel. The court then pronounced sentence as indicated.

DISCUSSION

Defendant maintains the trial court was required to order a full probation report for sentencing purposes and therefore abused its discretion in denying his motion to continue the sentencing hearing for that purpose.

We need not, and do not, decide whether the trial court was required to obtain a full probation report, although we observe it is likely the court was required to do so, as the crimes of which defendant was convicted did not render him “statutorily ineligible for probation.”¹ (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 808 [“Only when a defendant is statutorily ineligible for probation on all counts may a court not order the

¹ Although the trial court indicated defendant was not “eligible” for probation because “[t]here is no time left on the probation grants” and he “ha[d] timed out,” presumably this meant defendant had “exhausted his local custody time” as stated in the probation summary report. The Attorney General cites no authority, nor does he make any argument, that this constituted “ineligibility” excusing the preparation of a full probation report. As far as we can discern from the record, no full probation report was ever prepared in either case. Therefore, this is not a case where the issue is whether a supplemental report is required to update an earlier full probation report. (See *People v. Dobbins* (2005) 127 Cal.App.4th 176, 180–182 (*Dobbins*).)

preparation of such a report.”], disapproved on another ground in *People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13.)

Rather, we conclude that, on this record, any error in failing to order a full probation report was harmless under the *Watson*² standard, as there is no reasonable probability defendant would have obtained a more favorable result had the court ordered a full probation report. (See *Dobbins, supra*, 127 Cal.App.4th at pp. 182–183 [rejecting claim that failure to order probation report is constitutional error; “alleged error implicates only California statutory law” and therefore “review is governed by the *Watson* harmless error standard”].)

The trial court had before it *extensive* information both about defendant’s criminal conduct and his personal history.

First, the probation “summary” report contained a significant amount of information, including chronicling the probation revocations, the grounds therefor, and the continuing modification of the terms and conditions of probation, including repeated imposition of significant jail time. The probation officer stated his recommendation on sentencing and the reasons for it, including that defendant had “shown no regard for his probation terms” despite multiple opportunities to comply, and “his violations [had] escalated to violent acts.”

Second, the defendant supplied the court with his own sentencing memorandum. Therein, he provided a fairly detailed statement in mitigation, discussing life experiences that had “played a significant role” in his criminal conduct, including being exposed to “constant gang violence” while he was a child and lived with his grandmother for five years in El Salvador, and returning to his family when he was 10 years old and finding his mother addicted to methamphetamines and his stepfather and two stepsiblings addicted to alcohol. His family was impoverished, and they faced repeated eviction. His mother repeatedly threatened to kill herself, and he spent many nights on the streets. He was shot, and nearly fatally so, when he was 22 years old, and he continues to experience

² *People v. Watson* (1956) 46 Cal.2d 818.

severe anxiety and depression. He had already begun to abuse alcohol, and after the shooting, the abuse became serious. Defendant also submitted two letters from aunts that further detailed the difficulties defendant faced as a youth and his lack of parental love and guidance.

Third, the sentencing hearing, itself, lasted an hour and 45 minutes, and during that time, the trial court reviewed relevant sentencing factors in exhaustive detail.

The court first recited the eight sentencing objectives set forth in California Rules of Court, rule 4.410. It next turned to the criteria set forth in rule 4.414 relevant to granting or denying probation, stating it had considered some of these criteria in coming to an indicated sentence. The court then went through each of the nine listed criterion related to the crimes (Cal. Rules of Court, rule 4.414(a)(1)–(9)), indicating some were inapplicable and asking the prosecutor and defense counsel their respective views on those that had some bearing on the cases. The court did the same as to the eight listed criterion related to the defendant (Cal. Rules of Court, rule 4.414(b)(1)–(8)). In the course of discussing these criteria with counsel, the court made specific reference to defendant’s sentencing memorandum. After this lengthy examination of the criteria set forth in rule 4.414, the court concluded “the factors weighing against probation are high” and “they certainly overcome, whatever facts, relating to either the defendant or the crime, would militate in favor of probation.”

The court then moved to the circumstances in aggravation set forth in California Rules of Court, rule 4.421 and those in mitigation set forth in rule 4.423, relating both to the crimes and the defendant. Again, the court reviewed each of the enumerated circumstances and solicited comment by the prosecutor and defense counsel on each. In addressing circumstances in mitigation, defense counsel directed the court’s attention to defendant’s sentencing memorandum. The court found that “[e]ven if [it] were to consider those mitigating circumstances, they would be substantially outweighed by the circumstances in aggravation” that “clearly preponderate over the circumstances in mitigation.”

The court next addressed whether the sentences in the cases should run concurrently or consecutively, and the court again undertook a factor-by-factor examination of the factors set forth in California Rules of Court, rule 4.425 and invited the prosecutor and defense counsel to state their views, which they did.

After this exhaustive examination of all of the factors relevant to defendant's sentence, the trial court restated its indicated sentence, three years and eight months, and invited argument from counsel. Defense counsel, again referencing defendant's sentencing memorandum, urged court to sentence defendant to concurrent two year sentences. In counsel's view, the indicated prison term was a "Draconian" increase from the jail terms that had been imposed for violating his probation, which counsel characterized as having run "concurrent[ly]." In the prosecutor's view, all parties had been "trying to basically keep the defendant from state prison," but these repeated efforts had failed, and the indicated sentence was appropriate.

The court then asked defense counsel if there was "anything else" he wanted to present. At that point, counsel asked, and was allowed, to present additional facts offered by his co-counsel.

Following this, the court imposed sentence as indicated.

Given the extensive information provided to the trial court—by way of the summary probation report, the defendant's sentencing memorandum, and the extended sentencing hearing—there is no reasonable probability the result would have been more favorable to defendant, had the alleged error in not requesting a full probation report not occurred. While defendant included a section in his opening brief entitled "Prejudice," it is in fact devoted to arguing that error occurred, not that the asserted error was prejudicial. Defendant does not, for example, identify any personal background information about himself that was not included in his own sentencing statement, yet would have been included in a full probation report and would in reasonable probability have resulted in a different sentencing decision. He has therefore failed to carry his burden of showing any error was prejudicial, and we affirm the judgment on that basis.

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Humes, P.J.

Margulies, J.

A154152, *People v. Ruiz*.